Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-712

JOHN I. MARVIN,

Petitioner

versus

CENTRAL GULF LINES, INC., FORMERLY CENTRAL GULF STEAMSHIP CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Petitioner, John I. Marvin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, dated June 27, 1977.

I.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported in 549 F.2d 977. Rehearing was denied on August 22, 1977. The original opinion and the order denying a rehearing are printed in Appendix A.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on

June 27, 1977, reversing the jury verdict in favor of petitioners. Rehearing was denied August 22, 1977.

Jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S.C., Section 1254(1).

III.

THE QUESTION PRESENTED FOR REVIEW

Whether it was proper for the Court of Appeals to reverse a jury verdict in a Jones Act proceeding on the grounds of insufficient evidence.

IV.

STATUTORY PROVISIONS INVOLVED

This case involves 46 U.S.C., Section 688 (Jones Act) which provides in pertinent part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with a right to trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railroad employees shall apply . . . "

V.

STATEMENT OF THE CASE

This is an appeal from a jury verdict in favor of plaintiff

in the full sum of TWENTY-FIVE THOUSAND AND NO/100-- ($25,000.00)--DOLLARS. The plaintiff, John I. Marvin, was injured when he was struck in the head and face by a mooring line which slipped off of a fairlead during the course of a docking operation. The ship, the S.S. GREENSPRINGS, owned and operated by the defendant, Central Gulf Lines, Inc., formerly Central Gulf Steamship Corporation, had arrived at Pusan, South Korea on January 17, 1972. As it came into its berth, the crew working on the bow was ordered to run out a bow line and a spring line. Plaintiff was assigned to handle the spring line which ran astern on the starboard side of the ship. The bow line was run forward. Both of these lines were secured to bollards situated on the dock. At this point it was determined that the ship had come in forward of its proper berthing spot and the crew was ordered to slack off both lines so that the ship could be moved astern.The spring line was then moved approximately 150 feet further astern and secured to another bollard. The crew was then ordered to heave on the spring line. The windlass was activated and the slack was taken up in the spring line. Plaintiff was handling the line as it came off of the windlass. During this entire operation he was taking orders from the Chief Mate, who, along with the boatswain, was standing on the starboard side of the ship with an unobstructed view of the spring line, the windlass and the plaintiff. As tension built up in the spring line the ship began to move astern. There was at least one tugboat along the port side of the vessel. Throughout this stage of the docking manuever, plaintiff continued to follow the orders of the Chief Mate who was motioning to heave on the spring line. Suddenly, and without warning, the spring line slipped off of the stationary fairlead, which was situated forward of the windlass, striking plaintiff and another seaman who was standing to his rear coiling the line

on the deck. The force of the blow knocked plaintiff, who was 5 feet 8 inches tall and weighed 225 pounds, to the deck and dazed him. He got up immediately to resume his task. He observed that the line which he was handling was lying on the deck and had come unwrapped from the windlass. He was bleeding from a laceration of the eyelid. A fellow seaman brought him a rag to cover his eye and helped him below.

As a result of his injury, plaintiff was hospitalized in Pusan, South Korea for a period of thirteen days. It was not until the fifth or sixth day, after he began to complain of pain and a feeling of movement in his face, that x-rays were taken and he was advised that he had fractured his cheekbone (zygoma) in several places. Nothing was done to repair this fracture at this time. Plaintiff was repatriated to the United States and was admitted to the United States Public Health Hospital in New Orleans, Louisiana, where he underwent surgery for the repair of the fractured cheekbone. Part of this surgery involved the insertion of metal sutures in plaintiff's skull. These metal sutures are permanent in nature. Plaintiff was hospitalized in New Orleans for a period of some fourteen days. Thereafter, he was treated on an out-patient basis until March 30, 1972 when he was declared fit for duty. Since his discharge from treatment, plaintiff has been consistently troubled by a feeling of "tightness" in his right eye and has had recurrent headaches. Further, as a result of the injury and surgery, plaintiff was left with facial scars and a narrowing of the lateral fissure of the right eye.

VI.

REASONS FOR GRANTING THE WRIT

A. THE JUDGMENT OF THE COURT OF APPEALS REVERSING A JURY VERDICT IN FAVOR OF THE PETITIONER IS ABSOLUTELY CONTRARY TO A LONG AND WELL-ESTABLISHED LINE OF DECISIONS OF THIS COURT.

This case was instituted pursuant to 46 U.S.C., Section 688 (Jones Act.) It was tried before a jury. The plaintiff himself was the only witness to testify as to the facts. At the conclusion of the case, the trial judge denied defendant's motion for a directed verdict. The defense then rested without putting on any evidence. The defendant renewed its motion for a directed verdict. Again, the motion was denied. The jury returned a verdict in favor of plaintiff, holding the defendant employee to be guilty of negligence. Thereafter, defendant moved for judgment n.o.v. After a full hearing the trial judge denied the motion. At this point, therefore, the plaintiff had convinced six jurors and the judge that he had been injured as a result of the defendant's negligence. Seven people who had seen the plaintiff and had heard his utterly uncontroverted testimony agreed that there was sufficient evidence to support a finding of negligence. Nevertheless, on appeal, a panel of three judges, speaking through Thomas Gibbs Gee, reversed the verdict on grounds that "the evidence does not justify a finding of negligence." In so doing, the Court of Appeals effectively deprived the plaintiff of his statutory right to have this grievance *tried by a jury*. Additionally, this reversal flies in the face of the well-settled jurisprudence of this Court interpreting the Federal Employers' Liability Act (F.E.L.A.)

and, in turn, the Jones Act. If permitted to stand it will mark a significant turnabout in a solid line of decisions favoring jury verdicts in cases of this type.

Over the past twenty-five years there have been numerous cases in which the Supreme Court reversed judgments of lower courts that had taken cases away from the jury in actions arising under F.E.L.A. and the Jones Act. A list of such cases is found in the appendix to the concurring opinion of Justice Douglas in *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959). Certain of these cases have been cited with frequency in subsequent opinions of the Court.

In *Lavender v. Kurn*, 327 U.S. 645 (1946), a switchman was found unconscious with a fractured skull. The autopsy showed that he had been hit by some fast moving small round object. The administrator of plaintiff's estate contended that the switchman had been struck by the mail hook of a passing train. The railroad company contended that he had been murdered. In commenting upon the strength of the defendant's hypothesis and the weakness of the plaintiff's, the Supreme Court said:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney (decedent). And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference the respondents were not free to litigate the factual dispute in a reviewing Court. Under these circumstances it would be

> an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases.)
>
> "It is no answer to say that the jury's verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. at 652-653.

Perhaps the most famous case dealing with the jury function in a Jones Act case is *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1955). There the Supreme Court reversed a judgment affirming a directed verdict in favor of the defendant.

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by

direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or a failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[We] think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' " 350 U.S. at 525-526.

In *Schulz* the evidence adduced on trial showed only that the decedent was last seen walking toward several poorly illuminated tugboats. His job involved checking all of the tugboats and he would have been required to step from one to the other in the performance of his duties. Later in the evening it was discovered that the decedent was missing. His body was found several weeks later clutching a flashlight. The Court's discussion of the evidence, in light of the plaintiff's burden under the Jones Act, is significant:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that

> defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flash light gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the Courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the Court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.
>
> "We think the evidence was sufficient to require submission of the case to the jury and that it was error not to do so." 350 U.S. at 526-527.

It is clear that the burden on the plaintiff to prove causation in a Jones Act case is very light. Indeed, in view of the language in *Lavender* that "only when there is a complete

absence of probative facts" should the case be taken from the jury, it is fair to conclude that even a scintilla of evidence is sufficient to create a jury issue. It is submitted that the plaintiff more than met his burden of proof in the instant case. Certainly, the "complete absence" standard as set forth in *Lavender* is not met. It is critical to recall at this juncture that the plaintiff was the *only* witness to testify. He stated unequivocably that the line which struck him was under heavy tension. He stated that the single line was being used to move the ship astern. He stated that it was not a normal movement of the ship. In this regard the following uncontroverted statements appear in the record:

> ". . .the line was working under a heavy strain. . ." App. 148.

> ". . .At the time of the accident the line, it was extremely, overly tight and it slipped the fairlead." App. 149

> ". . .It slipped the fairlead under heavy tension and it flew into my face and hit me." App. 150

> ". . .the line developed a lot of pressure and all of a sudden it went flying through the air. There was a lot of force applied someplace. I don't know how it was but it was there. It was not just a normal movement of the ship." App. 150

He stated that he was under the direct supervision of the Chief Mate, who, at the time of the accident, was on the bow of the ship, with the petitioner. He stated that the Chief Mate had an unobstructed view of the line, the anchor windlass which was being used to exert tension on the line and the dock. He stated that the telephone on the bow,

which served as the only means of communicating with the bridge, was useless when the windlass was operating because of the noise level. He diagrammed a physical arrangement of the bow, with the spring line running from the windlass forward to the fairlead then astern to a point of the dock, which created a slingshot type effect. He then stated that his working station had placed him inside of the slingshot. He stated that at least one tugboat was involved in the attempt to move the vessel astern.

Against this uncontroverted testimony and evidence, the defendant responded with absolutely nothing.

It is truly incredible that a Court of Appeals could conclude after reviewing the record in this case that there was a complete absence of probative facts to support the jury verdict.

The record is replete with evidence consisting of direct statements of witnesses and proof of circumstances from which the jury could fairly and reasonably infer that the defendant was negligent. The Court of Appeals has completely ignored the *pre-eminent role* of the jury in this particular type of case. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). Further, it has failed to heed the clear mandate of this Court that:

> "Courts should not assume that in determining questions of negligence juries will fall short of a fair performance of their constitutional function." *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

The judgment of the Court of Appeals in this case is wrong. Therefore, this Court should grant this application so that the jury verdict may be reinstated.

B. THE COURT OF APPEALS FAR EXCEEDED THE PROPER SCOPE OF REVIEW OF A JURY VERDICT IN A JONES ACT CASE BY INQUIRING INTO THE FACTS OF THE CASUALTY AND BY EXAMINING THE CREDIBILITY OF THE PLAINTIFF.

It is well-settled that the scope of appellate review of a jury verdict in this type of case is severely limited. This Court has repeatedly held that it is not the function of the appellate court in a Jones Act case to "search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & Pikin Union Railroad*, 321 U.S. 29 (1944). See also *Schulz v. Pennsylvania Railroad Co., supra.*

It is for the jury alone to accept or reject conflicting, inconsistent or even improbable inferences. The fact that the reviewing Court might draw a contrary inference is of no moment. *Lavender v. Kurn, supra.* In a Jones Act case, the jury plays a *pre-eminent role. Ferguson v. Moore-Mc Cormack Lines*, 352 U.S. 521 (1957). Just as the burden of proof is significantly lessened in a Jones Act case, so is it that a claimant's right to jury determination is more zealously protected. *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15 (1959).

A reading of the opinion written by Judge Gee in this matter makes it clear that he does not agree with the limitations imposed upon him by this Court in the review of a

Jones Act jury verdict. In fact, Judge Gee does not agree with much that this Court has done in this area. Prior to his appointment to the Bench, Judge Gee had occasion to comment on what he described as "the wondrous world of mirrors" revealed by a series of U.S. Supreme Court decisions *reversing* appellate courts which had taken Jones Act and F.E.L.A. cases away from juries. The title of Judge Gee's comment is particularly interesting – "A Dissenting Postscript or, Notes From Underground," 36 Texas L.Rev. 157 (1957). This article is reprinted in full in Appendix B. In it he proposes ". . .a fresh (if inept) approach . . ." to restore to the lower courts "their traditional, common law powers of review . . ." In this regard, he concludes the comment with the following statement:

> ". . .Congress made the FELA in the image of common law negligence. Amendments by construction have occurred from time immemorial and probably have never been more in vogue than they are today; but this is a fair-sized one and I, in company with the late Mr. Justice Jackson, think that the Court should not have done it.."

The "fair-sized" amendment to which Judge Gee refers, and with which he strongly disagrees, deals with the primacy of the jury's role in such cases. The decisions of this Court which he severely criticizes include *Rogers v. Missouri Railroad*, 352 U.S. 500 (1957), *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957), *Deen v. Gulf, C.& S.F. Railroad*, 353 U.S. 925 (1957). He summarizes his feelings about these decisions with the following statement:

> "If the duty of care laid upon the employer by them is subject to characterization, surely it is that of a guardian angel rather than that of a

> reasonably prudent man. I do not intend now, or at any time, to speak with disrespect of the United States Supreme Court, but I cannot take seriously the Court's assertion that the liability here imposed is based on negligence."

It is noteworthy that the cases criticized, in particular, the *Rogers* case, stand today as controlling precedents in this area. Undoubtedly, Judge Gee is entitled to disagree on an academic level. However, as a judge he is bound to follow the letter and the spirit of these decisions. He has not done that in this case. He has taken the opportunity in this case to attempt a departure from the settled jurisprudence. He has done it, not by quarreling on the record with precedent, but by a detailed examination of the evidence. In this regard, it is interesting that, with the exception of brief references to *Lavender* and *Schulz*, the opinion of the Court of Appeals cites no other authority from this Court. Never does Judge Gee address himself to the question of usurpation of the function of a jury. This, it is supposed, is understandable since Judge Gee, quite simply, does not agree with the Supreme Court decisions on this subject.

In view of the fact that petitioner's testimony was uncontroverted and that the defense introduced nothing into evidence, it is submitted that the inquiry into the facts as reflected in the opinion assumed the proportions of advocacy on the part of Judge Gee, as opposed to mere review. Several instances where this is particularly evident are as follows:

> 1. "Even if we assume that Marvin's testimony was sufficient to establish that the line jumped

> the fairlead at all – *at several points he seemed fairly sure, but his equivocation at other times removed much of the strength from his testimony* – he was unable to offer any physically cogent reason why the spring line might have jumped the fairlead." Opinion of the Court of Appeals, A-7. (Emphasis added.)

This statement evidences a disagreement with fact and a reflection on credibility. There was absolutely no doubt that petitioner was struck by the line when it jumped the fairlead. Even the defense counsel had agreed to this fact:

Question by Mr. Charrier, attorney for defendant:

Q. ". . .you say the line struck you?"
A. "Yes."
Q. "And, I am willing to agree with you on that. . ."
App. 191

It is submitted that it is not the duty of a reviewing judge to weigh the "strength" of testimony in a jury case. This is solely and exclusively a matter for jury determination. Additionally, it is indeed strange that a reviewing judge would mention "equivocation" when even the counsel for defendant agrees with the statement.

> 2. "Marvin's account offers his belief that the line slipped off because the backing procedure put too much tension on it; but unless the hawser was being pulled *upward*, either from the windlass or from the other end (and there was no testimony to that effect), inordinate tension on the line would not tend to make it slip off . . ." Opinion of the Court of Appeals, A-8 (Emphasis added)

In a footnote to this statement, Judge Gee *argues* that "tension would tend rather to snap the line completely." He *supports* this argument by noting what he feels is an inconsistency between pre-trial deposition testimony and testimony at the trial. This type of appellate advocacy is totally outside the proper scope of review and is expressly forbidden by the clear mandate of this Court. *Tennant v. Peoria & Pikin Union Railroad, supra.* and *Schulz v. Pennsylvania Railroad Co., supra.* In effect it substitutes the opinion of the reviewing Court for that of the jury in a purely factual matter and then supports that opinion by weighing the credibility of the witness.

Even more discouraging is the fact that the conclusion reached by the reviewing Court is absolutely incorrect. There was clear evidence in the record that the hawser ran *up* from the fairlead to the top of the windlass.

Q. "Could you tell us, Mr. Marvin, the relative height of that fairlead that you have drawn up there?"

A. "Around five feet, about five feet high with the pedestal on it and all. The lines would have been up sort of like this. It comes together, you see."

Q. "The lines, you say ---"

A. "Now, it might have been a little shorter than the winch."

Q. "But, the top of the fairlead, you say, might have been shorter than the top of the drum?"

A. "Yes."

3. "The evidence in the record could not support a jury finding against Central Gulf on the former theory, negligence inherent in the backing procedure employed, since no testimony was heard suggesting that backing the ship in this manner was a particularly dangerous or even unorthodox method. Indeed, Marvin himself indicated that he had on other occasions assisted in backing a ship this way." Opinion of the Court of Appeals, A-6.

A footnote to support this position reflects that in the routine backing operation the line gets "a reasonable amount" of pressure. Obviously, the critical word in Marvin's response is "reasonable." When asked about the maneuver in the instant case his response was quite different:

> ". . .the line developed a lot of pressure and all of a sudden it went flying through the air. There was a lot of force applied someplace. I don't know how it was, but it was there. *It was not just a normal movement of the ship.* App. 150 (Emphasis added.)

This unchallenged statement stands as the only evidence in the record on what occurred during this particular backing maneuver. It matters not that in the normal maneuver a reasonable amount of tension develops. In this maneuver there was abnormal movement of the ship which caused *more* than reasonable tension. Certainly, given this testimony, it was fair for the jury to infer that this abnormal movement created excessive tension and caused the accident. It is difficult to understand how the reviewing judge could ignore this specific testimony in favor of generalized statements about "every" backing operation using this technique. It is another clear example of an improper and

unwarranted "search" of the record. Significantly, the record reflects that the ship's captain was present in court and did not testify, even though he was sworn as a witness for the defendant. If Marvin's testimony regarding abnormal movement and excessive force was incorrect, then certainly the captain might have refuted it. This was not lost upon the jury. App. 203-205.

> 4. ". . .We have no evidence on which to base a concluclusion that the Chief Mate or any other employee should have seen that the accident was about to occur and acted accordingly." Opinion of the Court of Appeals A-9.

This factual conclusion absolutely defies explanation in view of the record in this case. The diagram which was made part of the record clearly places the Chief Mate on the bow:

Q. "Is that picture which you have drawn up there, does it properly represent the position of the Chief Mate with relationship to the line itself, how it passed by him?"

A. "Yes, that is approximately right."

Q. "Were you aware of the fact, if there was any obstruction between where the Chief Mate was standing and where the line was passing by him?"

A. "Obstruction?"

Q. "Was there any reason why he could not see the line, that you know of?"

BY MR. CHARRIER:

Objection, the same question.

BY THE COURT:

Well, was there any obstruction there?

A. "No, sir".

The record demonstrates that this line went right past the Chief Mate who had an unobstructed view, not only of the line itself, but of the windlass area and the dock. Certainly the jury could fairly and reasonably infer that the Chief Mate should have noted that the line was under excessive pressure. Failure on his part to do so or to take appropriate action would constitute negligence.

VII.

CONCLUSION

In conclusion, it is submitted that the United States Supreme Court has consistently viewed jury verdicts as being essential to effectuate the purpose and intent of F.E.L.A. and the Jones Act.This philosophy is made evident by the disproportionate number of such cases in which this Court has granted certiorari to review a single issue, i.e., sufficiency of evidence. The fact that there have been fewer petitions for certiorari in recent years is only evidence of the fact that lower courts have recognized that claimants are not to be deprived of a jury determination of their rights under these statutes, except under the most extreme circumstances. The judgment of the Court of

Appeals in the instant case is a serious and, it is submitted, conscious departure from the well-settled standards established by this Court. If the judgment is permitted to stand, it can do nothing but create hopeless confusion in the lower courts and among litigants in an area where this Court has clearly established a degree of uniformity.

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

RESPECTFULLY SUBMITTED:

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CERTIFICATE

I hereby certify that copies of this petition have been served on counsel for respondent, Central Gulf Lines, Inc., by placing same in the U.S. Mail, postage prepaid, properly addressed to John O. Charrier, Jr., 28th Floor - 225 Baronne Street, New Orleans, Louisiana 70112, on this 17th day of November, 1977.

_____
BRUCE A. NORTH

APPENDIX A

John I. MARVIN, Plaintiff-Appellee,

v.

CENTRAL GULF LINES, INC., formerly Central Gulf Steamship Corporation, Defendant-Appellant.

No. 75-3759.

United States Court of Appeals, Fifth Circuit.

June 27, 1977.

Seaman brought suit against shipowner under the Jones Act for injuries sustained when he was hit in the face by a line while involved in backing the ship using the power of its own anchor windlass to take in a spring line. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., rendered judgment on a jury verdict for the seaman and shipowner appealed. The Court of Appeals, Gee, Circuit Judge, held that the fact that the line somehow came loose and struck the seaman did not establish the shipowner's liability for his injuries under the Jones Act, absent evidence that the procedure employed constituted negligence in and of itself or that the chief mate, who directed the docking operation, should have recognized the impending danger and stopped the operation and that he was negligent in failing to do so.

Reversed.

1. Seamen ⇐29(3)

Officer who requires seaman to do his work in dangerous manner when there are other and safer ways to do it is negligent, having breached his duty to exercise reasonable care for seaman's safety. Jones Act, 46 U.S.C.A. § 688.

2. Seamen ⇐29(1, 3)

Shipowner was not liable under Jones Act for injuries sustained by seaman when line somehow came loose and struck him, absent evidence that procedure in which seaman was engaged, backing the ship using the power of its own anchor windlass to take in a spring line, was so inherently dangerous that its use constituted negligence in and of itself, or evidence that chief mate, who directed the backing operation, should have recognized impending danger and stopped operation and that he was negligent in failing to do so. Jones Act, 46 U.S.C.A. § 688.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

John I. Marvin, an experienced, able-bodied seaman, was a crewman on Central Gulf's S/S GREEN SPRINGS when the ship docked at Pusan, South Korea,

on January 17, 1972. The GREEN SPRINGS was secured by bow and stern lines before it was decided that the ship was too far forward and should be moved some distance astern. Accordingly, the bow line was slacked and the stern line was moved to a bollard about 150 feet astern of the ship's original mooring point; from this bollard the line, an eight-inch hawser,[1] ran through the starboard bulwark of the ship, out onto the deck, forward to a fair lead[2] near the bow and around the fair lead and back some 40 feet astern to the starboard anchor windlass. The GREEN SPRINGS was to be moved backward under its own power by having the anchor windlass take in the stern line (a "spring line," as it is called). Marvin, whose duties included assisting in docking the ship, wrapped the hawser five or six turns around the windlass and took a position a few feet astern of it; by applying tension to the hawser as it came off the rotating windlass, he created sufficient friction for the windlass to take

1. The eight-inch dimension being the circumference of the hawser, its diameter would have been something under three inches.

2. The fair lead was a vertical assembly on the deck consisting of a shaft and a freely rotating spool; a rope could be run around the fair lead without chafing, as it would on a stationary shaft. The diagram drawn by Marvin when his deposition was taken indicated that the rotating spool was narrower in the middle than at either end, so that the hawser would tend to stay on the spool so long as sufficient tension was applied.

in the line. He could stop the process by releasing tension on the line, allowing the windlass to turn freely with the hawser slipping as it turned.

At some point in the backing of the ship Marvin was struck heavily in the face by what he believes to have been the hawser, snapping back in a sort of "slingshot" effect after slipping off the fair lead. Because his view of the fair lead was obstructed by the windlass, his testimony understandably was less than clear concerning the events which led to his injury. He did not see the hawser snapping back toward him before the force of the blow knocked him to the deck. His injuries were sufficiently severe that after he had received first aid below deck he was taken to a hospital in Pusan for treatment. Korean physicians initially sutured the lacerations in his face but did not realize that his cheekbone had been fractured until five or six days after Marvin entered the hospital, when his complaints of continuing pain led to an X-ray of his head and face. After thirteen days in the Pusan hospital, Marvin was flown back to New Orleans where doctors finally repaired his cheekbone with metal sutures and performed some plastic surgery.

Marvin was the sole witness at the trial below; at the conclusion of his testimony defendant Central Gulf moved unsuccessfully for a directed verdict in its favor.[3] *Res ipsa loquitur* was not pleaded, and the jury was not charged

3. In denying the motion the district court said, "I think there may be just barely enough there to go to the jury."

upon it. The jury found that the S/S GREEN SPRINGS was not unseaworthy, that Central Gulf had been negligent, that such negligence was a cause of Marvin's injuries, and that Marvin had suffered damages in the amount of $25,000. On appeal Central Gulf argues that, the evidence being insufficient to establish any specific negligence on its part, the motion for directed verdict should have been granted. We agree and thus do not address the other points raised in the briefs.

Although a Jones Act plaintiff suing in negligence shoulders a lighter burden than his counterpart on land would carry, G. Gilmore & C. Black, Admiralty §§ 6-35, 6-36 (2d Ed. 1975), we as an appellate court must still overturn a judgment based on a jury verdict in favor of the plaintiff "when there is a complete absence of probative facts to support the conclusion reached . . ." *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916, 923 (1946).[4] We look, then, for "evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn" to support the verdict and, thus, the judgment thereon. *Shulz v. Pennsylvania Railroad*, 350 U.S. 523, 526, 76 S.Ct. 608, 610, 100 L.Ed. 668, 671 (1956). Neither the

4. *Lavender* was decided under the Federal Employers' Liability Act (FELA). The Jones Act incorporates the FELA standard for evaluating the strength of plaintiff's case. 46 U.S.C. § 688 (1970).

testimony of Marvin nor the permissible inferences from that testimony supports the jury's finding that Central Gulf was negligent.

[1, 2] The record indicates two possible theories for finding actionable negligence on the part of Central Gulf in the docking maneuver during which Marvin was injured: the procedure employed, backing the ship using the power of its own anchor windlass to take in a spring line, may have been so inherently dangerous that its use constituted negligence in and of itself;[5] or, in the alternative, some employee of Central Gulf may have acted negligently in carrying out the operations. The evidence in the record could not support a jury finding against Central Gulf on the former theory, negligence inherent in the backing procedure employed, since no testimony was heard suggesting that backing the ship in this manner was a particularly dangerous or even unorthodox method. Indeed, Marvin himself indicated that he had on other occasions assisted in backing a ship in this way.[6] Absent any

5. An officer who requires a seaman to do his work in a dangerous manner when there are other and safer ways to do it is negligent, having breached his duty to exercise reasonable care for the seaman's safety.

Pedersen v. Diesel Tankers, 280 F.Supp. 421, 424 (S.D.N.Y.1967).

6. Q: But isn't it true, sir, that every time a ship is backed down, using this technique, the line really gets under pressure?

A: It gets a reasonable amount on it, yes.

evidence that the method employed was itself in any way unusual or hazardous, and the matter being well beyond the ambit of common knowledge or judicial notice, the jury had no basis for finding that the Central Gulf employees in charge of the GREEN SPRINGS acted negligently in choosing to move the ship in this manner.

Under the remaining theory of recovery, Marvin's testimony points to his conclusion that the chief mate, who directed the backing operation, was negligent in failing to stop the process (as by instructing Marvin to slack the line) before the line slipped the fair lead and struck Marvin. We are forced to conclude that the evidence likewise failed to make out this ground of recovery. Even if we assume that Marvin's testimony was sufficient to establish that the line jumped the fair lead at all—at several points he seemed fairly sure,[7] but his equivocation at other times[8] removed much of the

7. Marvin described the accident several times on direct examination as follows: "And we were doing that under the orders of the Chief Mate and the line slipped off of the fair lead." "[T]he line was working under a heavy strain and for some reason or another the line slipped the fair lead." "At the time of the accident the line, it was extremely, overly tight and it slipped the fair lead." "[I]t slipped this fair lead under the heavy tension and it flew into my face and hit me."

8. On cross-examination, when asked whether he knew for sure that the line jumped the fair lead, Marvin answered as follows: "I know that something flew through the air and hit me and *I can only guess that it was the line come up on the drum and it must have been that the line came off.*" The questioning continued:

strength from his testimony—he was unable to offer any physically cogent reason *why* the spring line might have jumped the fair lead. Given such a plausible hypothesis, we might be able to find support for the jury's verdict by reasoning that the chief mate should have recognized the impending danger and stopped the operation and that he was negligent in failing to do so. Marvin's account offers his belief that the line slipped off because the backing procedure put too much tension on it;[9] but unless the hawser was being pulled *upward*, either from the windlass or from the other end (and there was no testimony to that effect), inordinate tension on

"All you know is that something hit you?" Marvin replied, "Very much so, yes."

Later Marvin was asked: "If the line jumped the fair lead, Mr. Marvin, you cannot tell us, today, the reason it jumped the fair lead?" He answered, "No, I can only assume."

When deposed prior to trial, Marvin made it clear that he could only surmise that it was the hawser that hit him: "Well, *something hit me. I don't know what it was.* All I can say is something hit me, and the best thing I can see, it was a rope, mooring line did it."

9. *See, e. g.*, the testimony quoted in footnote 7, *supra*.

the line would not tend to make it slip off.[10] Even if on this occasion tension *did* somehow cause the line to slip, we have no evidence on which to base a conclusion that the chief mate or any other employee should have seen that the accident was about to occur and acted accordingly. It may well be that the line did slip off; if so, something must have caused it, such as perhaps a sudden roll of the GREEN SPRINGS because of the wake of a passing boat. Again, however, with no evidentiary basis for such a conclusion we certainly have no way to guess whether anyone should have been cognizant of impending danger and should have told Marvin to slack the line.

Although no reported cases are directly in point, several decisions allowing recovery to a seaman injured by a sudden movement of a line or rope support our holding by illustrating a quantum of evidence entirely different from that in the case before us. In *Coyle Lines v. Dugas*, 196 F.2d 59 (5th Cir. 1952), a seaman, Dugas, was in the process of securing some tow lines on a tugboat (which was engaged in freeing grounded barges)

10. Tension would tend rather to snap the line completely. Marvin, in his deposition, testified that he first thought that the line had broken and that it was not until three or four days later that a co-worker told him that it had instead slipped, intact, off the fair lead. At trial he testified that immediately after the accident he knew that the line had slipped off and that in fact he had gotten up from the deck and replaced it on the fair lead before being led below deck.

when the captain of the tug gave the order to move forward, causing one line suddenly to go taut and hit Dugas in the face, fatally injuring him. The court upheld a jury verdict of negligence on the part of the tug company partly on the basis of the captain's failure to see that Dugas was clear before making the line taut, on the strength of testimony that Dugas himself was supposed to give the signal to proceed and that he had not so signalled. In *Schybinger v. Interlake Steamship Co.*, 273 F.2d 307 (7th Cir. 1959), the plaintiff testified that he was injured when a winch cable flew up and struck him; he testified that the winch operator turned on the winch too fast so that the cable became taut as he stepped across it. Despite a good deal of conflicting testimony from other witnesses, the court held that the jury's verdict for the plaintiff was amply supported by his testimony. He had presented a viable explanation of how the accident occurred, and weighing the conflicting evidence was the proper function of the jury. *Clark v. Central States Dredging Co.*, 430 F.2d 63 (8th Cir. 1970), involved a seaman whose hand was crushed between an anchor cable and the bitt around which he was wrapping the cable. The jury's finding of negligence on the part of the defendant was amply supported by the seaman's testimony that the boat had been allowed to drift backward, causing the cable which he was wrapping suddenly to become taut and catch his hand. The plaintiff in *Pedersen v. Diesel Tankers*, 280 F.Supp. 421 (S.D.N.Y.1967), sustained severe arm injuries when a polypropylene line sud-

denly whipped off of a bitt and hit him. The tanker on which he was working had a fourteen-foot draft and had come into a dock at low tide when the water depth was only eleven feet; the captain then attempted to maneuver the grounded tanker closer to the dock by surging it against a polypropylene line at the bow. Testimony showed that the captain knew that polypropylene was too elastic to be used as a spring line, that it tended to stick to a bitt, and further that the lines were new and plaintiff had not been instructed in their use. The captain nevertheless ordered plaintiff to slack the line, which was under great pressure, and plaintiff complied, to his injury.

In each of the foregoing cases the plaintiff seaman was able to present some evidence supporting some theory of negligence on the part of some employee for whose actions the employer was liable. Marvin has not presented any evidence which would support the conclusion that anyone concerned acted negligently in any specific manner while docking the S/S GREEN SPRINGS. All that he, the sole witness, could say was that in the course of a procedure not shown to be uncommon or improper the line somehow came loose and struck him. No evidence was even presented as to the manner in which this did or could have happened, let alone that it resulted from anyone's carelessness. We may speculate that Marvin released his end of the line or that some mighty heave of the ship somehow snubbed the line over the lip of the fair lead, but no evidence bases these speculations and they remain

precisely that. In short, Marvin may have had a provable case, but he did not prove it. As we have noted, the burden of proving negligence and causation in a Jones Act case is a light one, but even at sea injury does not presuppose negligence. When, as here, the evidence does not justify a finding of negligence, we must reluctantly overturn the verdict. The judgment is

REVERSED.

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

Office of the Clerk
Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

August 22, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-3759 - JOHN I. MARVIN v. CENTRAL GULF LINES

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: s/ Brenda M. Hauck
Deputy Clerk

**on behalf of appellee, John I. Marvin.

cc: Mr. John O. Charrier, Jr.
Messrs. Bruce A. North
Malcolm Ziegler

APPENDIX B

A Dissenting Postcript or, Notes from Underground

THOMAS GIBBS GEE*

I have been asked to comment briefly on the preceding article by Mr. De Parcq. In one sense, I am an ideal choice for the task. Opposition to the article's conclusions was doubtless expected; it will be forthcoming. Moreover, I have the additional qualification that, being almost entirely unfamiliar with the wondrous world of mirrors revealed by the eleven decisions discussed and the comments made upon them, a fresh (if inept) approach might reasonably be anticipated. On the other hand anyone expecting a technical treatment of the subject or an illuminating exegesis of the decisions and their setting must be advised to read no further. This will be an article about an article and the decisions of which it treats.

A final preliminary observation: a reading of the eleven decisions discussed should convince anyone that comment or remonstrance upon them is likely to be peculiarly futile. Such comment is almost sure to take either the form of a gleeful dance on the grave of the negligence concept as applied to – and stated in -- the FELA (Mr. DeParcq's work) or a forlorn appeal to precedent and the dictionary (this comment). Neither is likely to weigh greatly with a United States Supreme Court which has clearly decided what it is going to do and which has the power to carry out that decision.

---

* Member of the Austin Bar.

Mr. Justice Douglas comments: "There was no showing that any device was *close at hand* which would have safely performed that task."[6]

Now, in order to maintain the terminology of fault here, we must somehow find a duty which we can recite with a straight face. What is it? That the employer must not furnish sharp butcher knives? Or ice cream with lumps in it? Or that he must always place "close at hand" to one dipping ice cream a tool intermediate between a scoop and a butcher knife? Apparently, the latter; yet, can we take this seriously within the framework of fault? Probably few would think so.

And of like kind are the *Deen v. Gulf, C. & S.F. Ry?* [7] (babbit-pot) and *Thomson v. Texas & P. Ry.*[8] (mail-bag) cases. In the *Deen* case the employee was injured in emptying a heavy pot. On the record the pot could have safely been handled either with certain tools not furnished or with additional help which was readily available. The jury found, in essence, that failure to furnish the tools was negligence and that the employer should have foreseen that the employee would attempt to do the work in the manner which caused his injury. What was the employer's duty here? Apparently, it was to furnish, not one, but *several* safe ways to do the job; or, to put it another way, to arrange matters so that the employee *could not* do the job in a dangerous manner.

---

6. *Id.* at 523. (Emphasis added). *Quaere:* Where is the burden of proof?
7. 353 U.S. 925 (1957) (mem. dec.), *reversing* 275 S.W. 2d 529 (Tex. Civ. App. 1955, error ref'd, n.r.e.).
8. 232 F.2d 313 (5th Cir. 1956), *rev'd per curiam,* 353 U.S. 926 (1957).

The basic conclusions of Mr. DeParcq's article are, in chief, as follows:

(1) The Supreme Court is to be commended for enforcing the right of jury trial in the instances discussed.
(2) The decisions "impose a stern duty on the railroads"[1] but do not make "a compensation act out of FELA."[2]

The unstated conclusion is that a scintilla of evidence of negligence and causation now suffices for liability under FELA, and that this is a good thing.

Mr. DeParcq asserts that the decisions impose a *stern* duty on the railroads.[3] It seems that stern is hardly the word. What they, in practical fact, require is that in businesses traditionally fraught with some hazards -- seafaring[4] and railroading -- the employer, on pain of unlimited liability, shall so arrange matters that his employees will be unable to injure themselves while working at the employer's business.

Ferguson v. Moore-McCormack Lines, Inc. [5] is peculiarly striking in this respect. Here the seaman involved found the ice cream which he was dipping too hard for the scoop furnished him. Taking up a convenient butcher knife, he fell to his task and, striking a hard spot, cut off two fingers in the process.

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1. DeParcq, The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term, at p. 155 supra.
2. Ibid.
3. Ibid.
4. As the main article notes, the Jones Act, applicable to seamen, is, for the purposes discussed here, idential to the FELA.
5. 352 U.S. 521 (1957).

It remains to notice the *Herdman*[11] decision, which is supposed to show that negligence remains the test of liability. Surely, it stands alone, and, standing alone, about all that it demonstrates is that where the employee is candid enough to testify himself out of court in express words, he will be permitted to do so.[12] This probably happens rarely.

In sum, liability here is not based on fault, because the incidents complained of were not, practically speaking, preventable by the employer. Nor, I think, is it based on negligence, for the injuries were not really foreseeable in most of the cases.

The temptation is strong to treat as mere "hot gospelling" the article's recurring assertions that jury trial is rescued from peril by these decisions, that lower appellate courts exhibit an incorrigible desire to "take away" just verdicts in order "to keep railroads solvent at the expense of maimed employees,"[13] and that the Supreme Court numbers among its members two "who regularly vote to sustain judgments for railroads." Doubtless these assertions are not soberly intended in whole, but they cannot be lightly dismissed. For they are based solidly on an emerging doctrine which is that in FELA and Jones Act cases the powers of the jury are not those which it has in other tort litigation

11. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
12. "In fact, the only evidence was petitioner's testimony that they [sudden stops such as that in which he was injured] are not unusual or extraordinary. He testified: 'We got to expect them....' " *Id.* at 520.
13. DeParcq, *supra* note 1, at p. 154.

The *Thomson* decision involved the moving of mail bags by a female employee and is essentially similar to *Deen*, except that Miss Thomson did testify on cross-examination that she did not ask for help because she had been told in advance that none would be furnished. In light of the *Deen* holding this probably made no difference.

As for the *Ringhiser*[9] (epsom salts) decision, little can be said except that it effectively rules out parody as a possible mode of treating these decisions. If the duty of care laid upon the employer by them is subject to characterization, surely it is that of a guardian angel rather than that of a reasonably prudent man. I do not intend now, or at any time, to speak with disrespect of the United States Supreme Court, but I cannot take seriously the Court's assertion that the liability here imposed is based on negligence. Nor, it appears, can Mr. Justice Frankfurter (no railroad apologist):

"Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation."[10]

9. Ringhiser v. Chesapeake & O. Ry., 354 U.S. 901 (1957), *reversing per curiam* 241 F.2d 416 (6th Cir. 1956), *which affirmed* 148 F.Supp. 529 (S.D. Ohio 1956).
10. Stone v. New York, C. & S.L.R.R., 344 U.S. 407, 411 (1953) (dissent). Quoted by the district court in *Ringhiser*, 148 F.Supp. 529, 534 (1956). As the full text amply illustrates, Mr. Justice Frankfurter thinks that Congress could have done better than choose negligence as the test of liability in FELA. He is prepared, however, to recognize that it did so.

but greater ones. In *Ferguson*, for example, Mr. Justice Douglas speaks of "the jury, which plays a *pre-eminent* role in these. . . cases." [14] Judges are neither to keep from them causes in which it is possible - merely *possible* - that the employer could have arranged matters so that the injury would not have occurred, nor are they to set aside verdicts for insufficiency of evidence. *The jury is to pass on the sufficiency of the evidence* in the act of returning a verdict for the plaintiff, and in such instances the lower courts are warned away, in terms unmistakable, if thinly veiled, from exercising their traditional, common-law powers of review of such questions. This we may call the "town-meeting" theory of jury trial, or "away with these legal restrictions and let us vote on how much the railroad pays P." This may be magnificient, but it is not jury trial: "The right of the trial judge to set aside the verdict as contrary to the clear weight of the evidence is universally acknowledged in the United States, and is supported by clear precedent at common law." [15] I suppose that this would apply with at least equal force to the judge's power to determine an entire lack of evidence of probative weight.

As for the article's unstated conclusion - value judgment - that it is well that the town meeting should rule, I can only speak the banal. Certainly, it is good that injured people should be succored. And compensation acts are a good and

14. 352 U.S. at 523. (Emphasis added.)

15. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 758 (1957). Professor Wright's authority is of unusual pertinence here since, as I am advised, he has been of editorial assistance in preparation of the main article and since he and Mr. DeParcq, have been co-authors of other works in this area of the law. See, e.g., DeParcq and Wright, *Damages under the Federal Employers' Liability Act*, 17 Ohio St. L.J. 430 (1956).

just thing. But Congress made the FELA in the image of common-law negligence. Amendments by construction have occurred from time immemorial and probably have never been more in vogue than they are today; but this is a fair-sized one and I, in company with the late Mr. Justice Jackson, think that the Court should not have done it:

"If in this class of cases, which forms a growing proportion of its total, this Court really is applying accepted principles of an old body of liability law in which lower courts are generally experienced, I do not see why they are so baffled and confused at what goes on here. On the other hand, if this Court considers a reform of this law appropriate and within the judicial power to promulgate, I do not see why it should constantly deny that it is doing just that." [16] †

16. Wilkerson v. McCarthy, 336 U.S. 53, 76 (1949) (dissent).

† Since preparation of this article Justices Burton, Harlan, and Whittaker appear to have given up the unequal contest. See memorandum opinions in Gibson v. Thompson and Palermo v. Luckenbach SS Co., 26 U.S.L. Week 3128 (U.S. Oct. 22, 1957). Justices Frankfurter and Harlan, however, apparently aghast that a lower court has finally taken the Court at its word, were moved to protest (memorandum opinion, 26 U.S.L. Week 3177 (U.S. Dec. 1957)) the recent holding of the Seventh Circuit 26 U.S.L. Week 3177 (U.S. Dec. 10, 1957)) the recent holding of the Seventh Circuit that "under the recent decisions of the United States Supreme Court in F.E.L.A. cases, speculation, conjecture and possibilities suffice to support a jury verdict." Gibson v. Elgin, J. & E. Ry., 246 F.2d 834, 837 (7th Cir. 1957).

Supreme Court, U. S.
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DEC 19 1977
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 712

JOHN I. MARVIN,
Petitioner

versus

CENTRAL GULF LINES, INC., FORMERLY
CENTRAL GULF STEAMSHIP CORPORATION
Respondent

BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 712

JOHN I. MARVIN,

Petitioner

vs.

CENTRAL GULF LINES, INC., FORMERLY
CENTRAL GULF STEAMSHIP CORPORATION

Respondent

BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CITATION TO OPINION BELOW

The petition for writ of certiorari submitted by petitioner incorrectly cited the decision of the Fifth Circuit Court of Appeals. The correct citation of the appellate opinion, reversing the trial court and reflecting the denial of the petitions for Rehearing and Rehearing En Banc on August 22, 1977, is 554 F.2d 1295.

QUESTIONS PRESENTED

I. Did not the Court of Appeals for the Fifth Circuit properly reverse the judgment of the lower court denying defendant's motion for directed verdict and for judgment notwithstanding the verdict, on the grounds that there was a complete absence of probative facts to support the conclusion reached by the jury?

II. Did not the District Court commit reversible error in submitting the case to the jury and in refusing to grant respondent's motion for directed verdict where the evidence was insufficient to establish any specific negligence on the part of respondent?

STATEMENT OF THE CASE

The Litigation

John I. Marvin, a "bluewater" seaman, filed suit against Central Gulf Lines, Inc. for injuries he allegedly received while working as a crewmember of Central Gulf's S/S GREEN SPRINGS. Marvin asserted that he was injured on January 17, 1972, while assisting in docking the S/S GREEN SPRINGS at Pusan, South Korea, when he was struck by a mooring line with which he was working. Central Gulf filed an answer to the complaint denying any negligence or unseaworthiness and asserting Marvin's sole fault and/or contributory negligence.

The case was tried before a jury on June 12 and 13, 1975. At the close of the plaintiff's case, Central Gulf moved for directed verdict in its favor on the basis that plaintiff had failed to adduce evidence demonstrating the unseaworthiness of the S/S GREEN SPRINGS, and further had failed to adduce evidence of any negligence of Central Gulf which contributed, even in the slightest, to plaintiff's injury.

Central Gulf's motion for directed verdict was denied, and the jury thereafter returned a verdict in the plaintiff's favor finding Central Gulf negligent, the vessel seaworthy, and plaintiff free of contributory negligence, and the plaintiff entitled to damages in the amount of $25,000.00. Central Gulf timely filed a motion for judgment notwithstanding the verdict and for other alternative relief; the motion was denied by the Trial Court.

Central Gulf filed an appeal with the Fifth Circuit Court of Appeals seeking reversal of the denial by the Trial Court of respondent's motion for directed verdict and motion for judgment notwithstanding the verdict. The Fifth Circuit reversed the Trial Court, overturned the jury verdict, and held that the motion for directed verdict should have been granted for the reason that the evidence was insufficient to establish any specific negligence on the part of Central Gulf. Petitioner has filed a petition for writ of certiorari to which this brief is submitted in opposition.

The Casualty

Marvin was a seaman of some experience at the time of his injury. He first began going to sea in 1949 and since 1954 he has been classified as an able-bodied seaman. He joined the S/S GREEN SPRINGS on December 15, 1971, in New Orleans, Louisiana. The S/S GREEN SPRINGS, expecting to call in various Far East ports, arrived in Pusan, South Korea, on January 17, 1972.

As an able-bodied seaman and a member of the dock crew, it was Marvin's duty to assist with docking the ship. When the vessel arrived at its intended berth in Pusan on the morning of January 17, two lines were put out, a bow line and a spring line. The vessel docked "starboard side to" and in connection with the docking a bow line was run from the starboard bow area of the GREEN SPRINGS to a bollard forward of the vessel on the dock. A spring line was run

forward from a bollard on the dock approximately amidships through the starboard bulkhead of the GREEN SPRINGS at the number three chock, and forward through the starboard fairlead and from there aft to the starboard drum of the anchor windlass on the bow of the vessel.

While Marvin's testimony is confused, apparently after the bow line and the spring line were made fast, orders were given to slack off these lines, to move the spring line 150 feet astern to a bollard further down the dock and then to heave on the spring line to move the ship astern.In the task of moving the ship astern, Marvin's job was to handle the spring line. To do this, Marvin, after taking five or six wraps on the drum of the windlass, positioned himself two or three feet astern of the drum of the anchor windlass.

To move the ship astern, of course, all Marvin needed to do after taking the wraps on the drum was to keep tension on the line. To slack the line he merely need have slacked the tension he held on the line.

According to Marvin's account of the accident, after the ship began moving astern, but while still going astern, the line flew off and hit him in the head and face. While in a deposition taken before trial, Marvin admitted lack of knowledge of what struck him and caused his injury, and while at the trial he was still unsure about what had struck him, in large part Marvin believed that he had been struck by the mooring line with which he was working when it jumped the starboard fairlead.

Significantly, however, no witnesses were called on the plaintiff's behalf other than himself, and no documentary

or demonstrative evidence was introduced by the plaintiff which demonstrated a cause of the line "jumping the fairlead." Moreover, Marvin was unable to offer any explanation for the line jumping the fairlead as he contended, other than to say that the line came off "for some reason or other."

After being struck in the face, Marvin was provided with first aid on ship and sent to a hospital in Pusan. After receiving sutures to his face at the hospital, Marvin returned to the ship, picked up some belongings and then returned to the hospital. He remained in the hospital in Pusan for several days, and then was repatriated to the United States, specifically New Orleans. Arriving in New Orleans, he was admitted as an inpatient in the Public Health Service Hospital and continued his inpatient treatment there for approximately two weeks. He was declared fit for duty on March 30, 1972, two and one-half months after the accident, and was willing and able to re-ship at that time.

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

Even under the liberalized test of proof under the Jones Act, petitioner simply failed to carry his burden of proof. While the jury did indeed return a verdict in the petitioner's favor on the negligence issue, the Fifth Circuit Court of Appeals properly held that the evidence and the law make it clear that the case should never have been submitted to the jury for its consideration.

DID NOT THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY REVERSE THE JUDGMENT OF THE LOWER COURT DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, ON THE GROUNDS THAT THERE WAS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE CONCLUSION REACHED BY THE JURY?

At the close of Marvin's case, which consisted only of his testimony and stipulated medical reports, Central Gulf moved for directed verdict in its favor. The Trial Court being greatly disposed to grant the motion, nonetheless denied it with the indication that it would be reconsidered should the jury bring in a verdict. In so ruling, the Trial Court commented that ". . .there may be just barely enough there to go to the Jury." When the Trial Court denied its motion for directed verdict, after reading a stipulation from the pre-trial order, Central Gulf rested.

The Fifth Circuit agreed with Central Gulf that the Trial Court erred in submitting the case to the jury. The proof which the plaintiff adduced was neither "barely enough" nor did it compromise the "scintilla of evidence" required to properly place the matter before the jury for its determination.[1]

It is fundamental that under the Jones Act, damages may only be recovered for negligence, *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065; *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440,

1. Gunning v. Cooley, 1930, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed 720; Galloway v. United States, 1943, 319 U.S. 372, 63 S.Ct. 1077; Hawley v. Alaska Steamship Co., 236 F.2d 307 (9th Cir. 1956); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969).

74 L.Ed. 1082; *Buford v. Cleveland & Buffalo Steamship Co.*, 192 F.2d 196, 198 (7th Cir. 1951); *Repsholdt v. United States*, 205 F.2d 852, 856 (7th Cir. 1953). It is equally fundamental that the burden of proving negligence in a Jones Act case is upon the plaintiff. *Gypsum Carrier, Inc. v. Handlesman*, 307 F.2d 525, 534 (9th Cir. 1962); *Diddlebock v. Alcoa Steamship Co.*, 237 F.Supp. 538, 541 (E.D. Pa. 1964); *Schlicter v. Port Arthur Towing Co.*, 288 F.2d 801, 805, 806 (5th Cir. 1961); *Traupman v. American Dredging Co.*, 470 F.2d 736 (2d Cir. 1972).

While Central Gulf, as a vessel owner, was subject to a more liberalized or strict standard of care than that imposed on its landside brethren, the "statute does not prescribe liability without some proof of fault" nor does it relieve a Jones Act plaintiff from showing "facts from which a jury can reasonably infer that either his employer or his co-workers were negligent." *Traupman*, 737, *supra; Armstrong v. Commerce Tankers Corp.*, 311 F.Supp. 1236 (S.D. N.Y. 1969); aff'd. 423 F.2d 957 (2d Cir.) cert. den. 400 U.S. 833, 91 S . Ct. 67, 27 L.Ed. 2d 65 (1970). More succinctly put, "there must be some evidence" of negligence[2] In *Perry v. Morgan Guaranty Trust Company of New York*, 528 F.2d 1378, 1379 (5th Cir. 1976), the Fifth Circuit restated clearly and succinctly that in Jones Act cases "...there must be some evidence from which a jury can infer that an unsafe condition existed and that the owner either knew, or in the exercise of due care, should have known of it." There was no such evidence presented in the record of this case.

In Marvin's petition for writ of certiorari, it is argued that the reversal by the Fifth Circuit was "absolutely

2. *Schlichter, supra*, at 806

contrary to a long and well-established line of decisions of" the United States Supreme Court. In support of this argument petitioner relies on the *Lavender v. Kurn*, 327 U.S. 645 (1946), and the *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956), decisions which are the exact two Supreme Court cases cited in the opinion of the reversing appellate court. The Fifth Circuit in *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295, 1297, (5th Cir. 1977), stated as follows:

> "Although a Jones Act plaintiff suing in negligence shoulders a lighter burden than his counterpart on land would carry, G.Gilmore & C. Black, Admiralty §§6-35, 6-36 (2d Ed. 1975), we as an appellate court must still overturn a judgment based on a jury verdict in favor of the plaintiff 'when there is a complete absence of probative facts to support the conclusion reached....' *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916, 923 (1946). We look, then, for 'evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn' to support the verdict and, thus, the judgment thereon. *Shulz v. Pennsylvania Railroad*, 350 U.S. 523, 526, 76 S.Ct. 608, 610, 100 L.Ed. 668, 671 (1956). Neither the testimony of Marvin nor the permissible inferences from that testimony supports the jury's finding that Central Gulf was negligent." (Footnotes omitted.)

An examination of the testimony in this case not only leaves one with a clear and distinct understanding that Marvin proved nothing but an injury, the record also demonstrates not a scintilla of evidence upon which Central Gulf's liability can be based. Synopsizing the pertinent parts of Marvin's testimony reveals that while he contended that the line jumped off the fairlead, he did not know and only could *assume* some unknown cause for the occurrence. Moreover, not only does the evidence fail to establish any cause for the line jumping the fairlead, there is a distinct lack of evidence to prove either that the line actually jumped the fairlead or even that the line was what struck Marvin at all. When Marvin was pressed about what hit him, he testified, "maybe the Captain struck me, I don't know."

In any event, the record makes it abundantly clear that Marvin could only assume possible causes for his injury. Even if it be accepted that the line jumped the fairlead, the best explanation and cause Marvin could offer for this occurrence was "...the line was working under a heavy strain, and *for some reason or another*, the line slipped the fairlead."

Petitioner's position that Marvin's testimony was uncontroverted and as such presented sufficient facts to support a jury finding of negligence is untenable. Marvin could not testify with conviction as to *what* hit him, much less, as to *why* something hit him. The gravamen of the Fifth Circuit's reversal was the simple fact that Marvin failed to present sufficient facts to support the jury finding of actionable negligence; Marvin's testimony presented mere assumptions and speculation as was explicitly pointed out in the appellate court's decision in *Marvin, supra*, at 1298, fn. 8, as follows:

"8. On cross-examination, when asked whether he knew for sure that the line jumped the fairlead, Marvin answered as follows: 'I know that something flew through the air and hit me and I can only guess that it was the line come up on the drum and it must have been that the line came off.' The questioning continued: 'All you know is that something hit you?'
Marvin replied, 'Very much so, yes.'

Later Marvin was asked: 'If the line jumped the fairlead, Mr. Marvin, you cannot tell us, today, the reason it jumped the fairlead?' He answered, 'No, I can only assume.'

When deposed prior to trial, Marvin made it clear that he could only surmise that it was the hawser that hit him: 'Well, something hit me. I don't know what it was. All I can say is something hit me, and the best thing I can see, it was the rope, mooring line did it.' "

The evidence, as presented by Marvin, the only witness to testify, failed to establish an evidentiary basis for the jury's conclusion that Central Gulf was negligent. Petitioner very simply failed to carry his burden of proof.

In *Rogers v. Missouri Pacific Ry. Co.*, 1957, 352 U.S. 500, 507, 77 S.Ct. 443, 448 1 L.Ed. 2d 493, the Supreme Court stated a rule of causation making the employer liable in the event of his negligence which contributes even in the slightest manner to his employee's injury. As the *Traupman* Court observed:

> "...several Jones Act and Fela cases...[have allowed juries]...to speculate on the connection between the defendant's admittedly negligent act and the plaintiff's injuries. [Citing cases.]...These cases, however, cannot be read to give a jury the same latitude in determining whether the act complained of was negligently performed in the first place." 470 F.2d 736, 738.

In submitting the case to the jury the district court judge may have been laboring under the erroneous view that the slightest negligence of Central Gulf would be sufficient for fixing liability in this case. Whether he held this erroneous view or not, it is clear that the judge erred in submitting the case to the jury because not even a scintilla of evidence was adduced on which to base a finding of negligence on the part of Central Gulf. Therefore, it likewise follows that the district judge was in error in refusing to grant Central Gulf's motion for judgment notwithstanding the verdict and that the reversal by the Fifth Circuit should be upheld.

Petitioner contends that the appellate court "far exceeded the proper scope of review...by inquiring into the facts of the casualty and by examining the credibility of the plaintiff." This contention is entirely incorrect. The reversing court succinctly described its role in *Marvin, supra,* at 1297, as follows:

> "...we as an appellate court *must* still *overturn* a judgment based on a jury verdict in favor of the plaintiff 'when there is a complete absence of probative facts to support the conclusion reached....' " (Emphasis added.)

The court went on to describe the reviewing procedure, citing the Supreme Court in *Shulz v. Pennsylvania Railroad, supra*, as one in which the appellate court looks for evidence of witnesses' direct statements or proof of circumstances from which inferences can fairly be drawn to support the jury verdict.

The Fifth Circuit in the case at bar followed precisely the above stated procedure by examining the record, which consisted of testimony by the plaintiff alone. There was no examination of Marvin's credibility because credibility is not at issue in this litigation. It is not a question as to whether Marvin was believable, but, merely as to whether there were any facts presented which tended to prove that Central Gulf was negligent and hence liable for Marvin's injury. The reviewing court found that the record did not reflect any direct testimony or inferences sufficient to support the jury's finding of negligence.

After an exhaustive study of the record in this case it is evidence that the jury verdict of negligence was based solely on the closing argument to the jury by counsel for petitioner wherein he made issue of the fact that Central Gulf did not present any witnesses. Petitioner re-urges this point in his petition at page 18 where he re-states that the ship's captain was present in Court but not called to testify. This Court cannot be swayed by petitioner's argument to the jury because, as a matter of law, the burden of proof rested with the plaintiff, Marvin, and he failed to carry his burden to prove that Central Gulf was negligent. Consequently, as a matter of law, Central Gulf was not required, nor even expected, to present testimony to refute that which had simply not been proven.

Respondent respectfully suggests that that portion of petitioner's petition, (contained in essence on pages 12-14, and A-15-21), which comprises an attack on the intentions and motivations of Judge Gee should be disregarded and stricken by this Court as being irrelevant, immaterial, and scandalous matter as is provided by Rule 40(5) of the Rules of the Supreme Court of the United States. The referenced portion of petitioner's petition is a simple and transparent attempt to discredit and embarrass Judge Gee by inferring that he would circumvent or ignore the controlling decisions of this Court.

It is ridiculous and naive of counsel for petitioner to contend that the appellate decision on appeal was solely that of the authoring judge, Judge Gee. The panel was composed of Judges Wisdom, Fay, and Gee. The petitions for rehearing and for rehearing en banc were reviewed and denied by judges other than just Judge Gee.

The charge by petitioner that Judge Gee engaged in advocacy is insulting to the integrity of the appellate procedure and borders on contempt. The decision authored by Judge Gee is a well-reasoned opinion which explains the basis for the reversal by examining the evidence and concluding that there were no probative facts adduced at the trial. The element of advocacy was absent: the appellate court performed the function which the district court was remiss in not undertaking by denial of Central Gulf's motions for directed verdict and for judgment notwithstanding the verdict. The trial testimony and permissible inferences were finally properly reviewed and assessed by the Fifth Circuit Court of Appeals and the order of reversal must stand.

DID NOT THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN SUBMITTING THE CASE TO THE JURY AND IN REFUSING TO GRANT RESPONDENT'S MOTION FOR DIRECTED VERDICT WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH ANY SPECIFIC NEGLIGENCE ON THE PART OF RESPONDENT?

Considering the evidence in its most favorable light to the petitioner's case, the petitioner proved nothing more than an accident and injury when the mooring line under a heavy strain *"for some reason or other"* slipped off the fairlead. It is pertinent to paraphrase here the *Traupman* [3] court's cogent reasoning: A jury will be allowed some latitude in speculating on a connection between admittedly negligent conduct of a defendant and an injury, but may not be permitted the same latitude with respect to determining that there was negligence in the first place.

The reversal by the appellate court was imperative since neither a cursory nor an in depth examination of the record reveals any negligence whatsoever on the part of Central Gulf. The jury, in reaching its finding of negligence, could only have acted out of abuse of discretion or misappreciation of law.

The Fifth Circuit found that the record indicated two possible theories for finding Central Gulf negligent: the procedure of backing the ship may have been inherently dangerous and constituted negligence, or one of Marvin's co-employees may have been negligent in carrying out the docking manuever. After a review of the testimony, the appellate court, *Marvin, supra,* at 1297, 1298, rejected both theories

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3. *Traupman v. American Dredging Co.,* 470 F.2d at 738.

and held as follows:

> "The evidence in the record could not support a jury finding against Central Gulf on the former theory, negligence inherent in the backing procedure employed, since no testimony was heard suggesting that backing the ship in this manner was a particularly dangerous or even unorthodox method. Indeed, *Marvin himself indicated that he had on other occasions assisted in backing a ship in this way.* [Emphasis added and footnote omitted.] Absent any evidence that the method employed was itself in any way unusual or hazardous and the matter being well beyond the ambit, of common knowledge or judicial notice, the jury had no basis for finding that the Central Gulf employees in charge of the GREEN SPRINGS acted negligently in choosing to move the ship in this manner.
>
> "Under the remaining theory of recovery, Marvin's testimony points to his conclusion that the chief mate, who directed the backing operation, was negligent in failing to stop the process (as by instructing Marvin to slack the line) before the line slipped the fairlead and struck Marvin. We are forced to conclude that the evidence likewise failed to make out this ground of recovery."

The reviewing court observed that Marvin was unable to offer any physically cogent reason *why* the line might have jumped the fairlead, and quoted Marvin's testimony that *"for some reason or another the line slipped the fairlead."*

The evidence fails to establish an unsafe procedure and there was no evidence on which to base a conclusion that a co-employee should have seen that the accident was about to occur. *Marvin, supra,* at 1298.

The trial of this case to a jury does not dispense with the requirement that negligence be proved by the plaintiff. *DeZon v. American President Lines, Ltd., supra; Jamison v. Encarnacion, supra; Buford v. Cleveland & Buffalo Steamship Co., supra; Repsholdt v. United States, supra; Gypsum Carrier, Inc. v. Handlesman, supra; Diddlebock v. Alcoa Steamship Co., supra; Schlichter v. Port Arthur Towing Co., supra; Traupman v. American Dredging Co., supra.*

In the case at bar there was a complete and utter failure to establish any proof of negligence on the part of Central Gulf. In returning a verdict for Marvin on the negligence issue, it is clear that the jury let its speculation "run riot."[4] The jury's verdict in Marvin's favor on the negligence issue, in spite of the complete lack of evidence of negligence, demonstrates clearly that its decision was an unpermitted "product of sheer surmise and conjecture."[5] Speculation, of course, "cannot supply the place of proof."[6] The rule of *Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 790, 90 L.Ed. 916 (1940), and *Rabb v. Canal Barge Company,* 428 F.2d 201 (5th Cir. 1970) is *not* to the contrary, and in this instance the appearance of reversible error is clear in that "there is a complete lack of probative evidence supporting the jury verdict."

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4. *Buford v. Cleveland & Buffalo Steamship Co., supra,* 199.

5. *Traupman, supra, 738.*

6. *Moore v. Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 578, 71 S. Ct. 430; *Buford v. Cleveland & Buffalo Steamship Co., supra, 199.*

With respect to respondent's position that Marvin simply failed to carry the burden of proof, reference is made to the decision of *Armstrong v. Commerce Tankers Corp.,* 423 F. 2d 957 (2d Cir. 1970). There, as in this case, plaintiff chose to rely upon his own testimony alone in establishing his case. The gravamen of his complaint was that while leaving a cabin aboard ship after one of the occupants of the cabin took offense at something he said, the door of the cabin slammed shut on his thumb "with force" producing a compound fracture. The jury returned a verdict in his favor finding that the negligence of one of his co-employees was the proximate cause of Armstrong's injury. The Trial Court granted defendant's motion for judgment notwithstanding the verdict on the ground that proof of negligence was wholly lacking. In affirming the Trial Court, the Second Circuit Court of Appeals said in pertinent part:

> "Although, as this circuit has emphasized before, a jury's verdict is not lightly to be set aside, it is apparent that the jury's finding that some active negligence was performed by the plaintiff's shipmates was sheer surmise and conjecture. [Citing cases]." 423 F.2d at 960.

Inasmuch as the jury verdict in favor of Marvin was based upon pure surmise and conjecture, as in *Armstrong,* the facts of this case readily support the Fifth Circuit's reversal of the jury verdict and of the district court's refusal to grant the motions for directed verdict and for judgment notwithstanding the verdict.

CONCLUSION

In conclusion, Central Gulf, respondent, urges this Court

to refuse the petition for writ of certiorari for the reason that the Fifth Circuit Court of Appeals properly reversed the judgment of the lower court denying defendant's motion for directed verdict and for judgment notwithstanding the verdict, on the grounds that there was a complete absence of probative facts to support the conclusion reached by the jury. In further support of respondent's position that the petition must be denied is the fact that the reviewing appellate court correctly held that the district court committed reversible error in submitting the case to the jury and in refusing to grant the motion for directed verdict where the evidence was insufficient to establish any specific negligence on the part of Central Gulf.

Finally, in support of respondent's position in opposition to this petition for writ of certiorari, Central Gulf relies on the cogent reasoning of the Fifth Circuit, which reflects a proper review of the evidence in the record:

> "Marvin has not presented any evidence which would support the conclusion that anyone concerned acted negligently in any specific manner while docking the S/S GREEN SPRINGS. All that he, the sole witness, could say was that in the course of a procedure not shown to be uncommon or improper the line somehow came loose and struck him. No evidence was even presented as to the manner in which this did or could have happened, let alone that it resulted from anyone's carelessness. . . .[T]he burden of proving negligence and causation in a Jones Act case is a light one, but even at sea injury does not presuppose negligence." *Marvin, supra* , at 1299.

Respondent, Central Gulf, urges this Court to recognize that the Fifth Circuit was correct in reversing the district court and in overturning the jury verdict for the obvious reason that Marvin failed to carry the burden of proof and, hence, the evidence presented did not justify a finding of negligence.

For the above stated factual and legal reasons, it is respectfully submitted that the petition for writ of certiorari must be denied.

Respectfully submitted,

JONES, WALKER, WAECHTER,
POITEVENT, CARRERE &
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CERTIFICATE OF SERVICE

I hereby certify that copies of this reply brief have been served on counsel for petitioner, John I. Marvin, by placing same in the U.S. Mail, postage prepaid, properly addressed to Bruce A. North, 820 Gravier Street, Suite 500, New Orleans, Louisiana 70112, this 16th day of December, 1977.

JOHN J. BRODERS